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Supreme Court of the United States

OCTOBER TERM, 1943.

281
No. _____

WADE S. THOMSON, JOHN W. THOMSON, COURTNEY
L. THOMSON, OLIVER C. THOMSON, MYRA M.
JOHNSON, JULIA ELIZABETH THOMSON, BERTHA
THOMSON, GUARDIAN FOR EUGENE THOMSON,
HUSTON THOMSON, CALVIN C. THOMSON, MINORS,
AND LILLIAN CRAWFORD, PETITIONERS,

VS.

LETA BUTLER, ROZELL GRIFFITH, LAURA THOMAS
SHEPPARD AND COM. P. STORTS, EXECUTOR,
RESPONDENTS.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT,**

and

BRIEF IN SUPPORT THEREOF.

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THOMSON, GUARDIAN FOR EUGENE THOMSON,
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AND LILLIAN CRAWFORD, PETITIONERS,

VS.

LETA BUTLER, ROZELL GRIFFITH, LAURA THOMAS
SHEPPARD AND COM. P. STORTS, EXECUTOR,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Chief Justice and Associated Justices of the Supreme Court of the United States:

Your petitioners, in support of their Petition for a Writ of Certiorari, to review the final judgment of the United States Circuit Court of Appeals for the Eighth Circuit, affirming a decree and orders of the District Court for the Western Division of the Western District of Missouri, at Kansas City, respectfully show:

A.

Summary Statement of the Matter Involved.

This proceeding in said Circuit Court of Appeals was an appeal to review a decree and orders of said District Court dismissing for want of jurisdiction an original suit in Equity by citizens and residents of Oklahoma, Texas and Indiana, against Citizens and residents of Missouri, where the matter in controversy exceeds \$3,000, to enjoin conspirant producers and devisees of a counterfeit Will, established by a judgment of the State court of Missouri, procured by fraud, without service of summons, process or notice, whereby petitioners, lawful heirs of Laura E. Saltonstall, deceased, were deprived of their property without due process of law and in violation of the 14th Amendment, stripped of their privileges and immunities, denied equal protection under the law, and deprived of their rights and titles to 1,000 acres of land and other real and personal property of said estate located in Saline County, Missouri, valued at \$100,000. The complaint (R. 1-10) alleges ultimate and constitutive facts which invoke an application or construction of the Constitution of the United States, namely: Section 2 of Article III, Section 2 of Article IV, and Section 1 of the 14th Amendment to the Constitution of the United States, to determine the rights, privileges and immunities asserted and relied upon in said complaint.

B.

Statement of the Jurisdiction of This Court.

1. Jurisdiction vests by the timely filed Petition for a Writ of Certiorari against the judgment of the said Circuit Court of Appeals.
2. Jurisdiction is invoked under Section 240 of Judicial Code as amended.
3. Jurisdiction is invoked because a Federal Question is alleged in the complaint.

C.

Date of Judgment to Be Reviewed.

Judgment of said Circuit Court of Appeals affirming the decree of said District Court was entered June 9, 1943; a timely Motion for Rehearing was overruled July 8, 1943; and the opinion of said Circuit Court of Appeals appears in _____ F. 2d _____ (R. 77 to 85).

This petition with supporting Brief and certified record are filed within three months next after the final judgment herein sought to be reviewed.

Statement of the Nature of the Case and the Rulings Bringing the Case Within the Jurisdiction of This Court.

The case originated in the Circuit Court of Saline County, Missouri, wherein your petitioners were named as parties defendant in the petition upon which judgment was taken against them therein, without summons or process being served on them, as required by the statutes of Missouri; that a forged Will was probated and judgment of the State court was procured by fraud, without process or notice, thereby disinheriting and defrauding your petitioners, lawful heirs to the estate of Laura E. Saltonstall, deceased, and to the advantage of respondents, who are strangers to the blood of decedent; that all of said proceedings were unbeknown to your petitioners until the Supreme Court of Missouri affirmed said judgment, whereupon your petitioners filed a complaint (R. 1-10), in equity in the United States District Court at Kansas City, alleging violations of the Constitution of the United States, that their property had been taken without due process of law, in violation of Section 1 of the 14th Amendment (R. 8); that their rights, privileges and immunities had been abridged, that the State by rendering said judgment had deprived them of their property without due process of law, that the State had denied them equal protection of the laws, that infant citizens of Oklahoma had

been treated differently from infant citizens of Missouri; and praying that respondents, by reason of the fraud they had committed, in procuring said judgment, be restrained from enjoying the benefits of said judgment, and for equitable relief (R. 10).

The Said Circuit Court of Appeals Ruled.

(R. 77-85:)

1. On page 81 of record, held:

"We must hold, also, that the trial court was correct in declaring that it had no jurisdiction of plaintiff's suit on the basis of a federal question being involved" * * * "They present no question here arising under the Constitution of the United States."

2. On page 81 of record, held:

"The due process clause of the 14th Amendment is not a guarantee against the use or results of perjury or fraud by parties to private litigation in state courts, uncountenanced by the general standards and processes of the state court system, nor does it afford a constitutional basis for relief in the federal courts from a judgment in such litigation obtained by these means;"

thereby implying that the judgment rendered by a judge of a state court, is not the act of the State.

3. On pages 78, 80-81 of record, held:

"The trial court properly held that the necessary diversity of citizenship was lacking to give a federal court jurisdiction on that ground. Frank Bush, one of the legatees under the will, was a resident of the same state as some of the plaintiffs";

and on page 80 said:

"It is clear, therefore, that Frank Bush was not and could not be a proper party plaintiff in the present suit, under Missouri law. On the other hand, unless and until he renounced all his rights under the will,

he was required to be made a party to the litigation and his interest, by legal imputation, was necessarily that of a defendant."

And on page 81, said:

"Plaintiffs accordingly are unable to contend that the trial court erred or abused its discretion in permitting Frank Bush to enter his appearance as a party defendant and to resist their attack upon the state court judgment."

4. On pages 82 and 83 of record, held:

"There is also no merit in the argument of plaintiffs that no publication could in any event validly be made under section 891, without the previous issuance of a summons, a return that 'the defendant or defendants cannot be found,' and a finding that the court is 'satisfied that process cannot be served,' as provided in section 893." * * *

On page 83 said:

"But there is no occasion to discuss further the provisions of the Missouri statutes relative to service of process, for another reason also exists why the service upon plaintiffs in the state court proceeding cannot be claimed here to be violative of due process. Plaintiffs' attack upon the service proceeds upon the assumption that they were necessary parties to the will contest, but such is not the case under Missouri law."

Cases Believed to Sustain Jurisdiction of This Court.

This court is vested with jurisdiction whenever there has been any violation of the Constitution of the United States, regardless of whether or not there be diversity of citizenship of the parties.

The following cases hold that where the complaint alleges an attempted appropriation of property or rights

without due process of law, in violation of the 14th Amendment to the Constitution of the United States, then a substantial Federal Question is presented.

Mosher v. City of Phoenix, 287 U. S. 29.

Kring v. State of Missouri, 107 U. S. 221.

Pyle v. State of Kansas, 317 U. S. 213.

C.

Questions Presented.

1. Does the complaint present a Federal Question?
2. Was the act of the Judge of the State Court, in rendering judgment therein, the act of the State, and does it bring it under the provisions of the 14th Amendment of the Constitution of the United States?
3. Can Frank Bush, who, while acting in good faith, under oath, voluntarily signed and filed a statement, entry of appearance and adoption of the complaint, a copy of which he attached to his affidavit, as a plaintiff in said District Court, then 5 months later after colluding in the interest of respondents, be allowed to change by an unsworn, unauthenticated, inconsistent, ancillary, purported entry of appearance as a defendant, with an interest of only \$500 from the forged will, when as a plaintiff he had an interest of \$2,000 in said estate, and when the change was a trick, a fraud, to deceive and mislead the court and affect its jurisdiction; and does not such conduct amount to a violation of the intendment of the Constitution of the United States which declares that one of its prime purposes is to establish justice?
4. Should an opinion be allowed to stand which misconceives the nature of this action, considering it on the basis of a will contest suit, instead of an action in Equity whose processes are to prevent the use of the law to effect injustice, and deprive forgers and thieves of their plunder; and should this misconception be allowed to be

applied in various rulings so that it conflicts with the admitted facts, the statutes and decisions of the courts of Missouri, rendering them meaningless; and is not such misconception contrary to the intendment and theory of the establishment of justice purposed by the Constitution of the United States?

D.

Reasons Relied On for the Allowance of the Writ.

1. Because the complaint presents a substantial Federal Question and the ruling of the court below is in conflict with applicable decisions of this Court.

2. Because the act of the Judge of the State Court in rendering judgment therein, was and is the act of the State, bringing it under the provisions of the 14th Amendment to the Constitution of the United States, and the ruling of the court below is in conflict with applicable decisions of this Court.

3. Because Frank Bush, who, while acting in good faith, under oath, voluntarily signed and filed a statement and entry of appearance in the District Court attaching copy of the complaint to his affidavit, approved and ordered filed by the court, then 5 months later after colluding in the interest of respondents, should not be allowed to change by an unsworn, unauthenticated, inconsistent, ancillary, purported entry of appearance as a defendant, for a \$500 interest in the forged will, when as a plaintiff he had \$2,000 interest in said estate, it being a trick, a fraud, to deceive and mislead the District Court and affect its jurisdiction, amounting to a violation of the intendment of the Constitution of the United States which declares that one of its prime purposes is to establish justice.

4. Because the opinion of the court below misconceives the nature of this action, considering it on the

basis of a will contest suit, instead of an action in Equity, whose processes are to prevent the use of the law to effect injustice, guard rights, privileges and immunities of its citizens and deprive forgers and thieves of their plunder; and which misconception as applied in various rulings conflicts with the admitted facts, with the statutes and the decisions of the courts of Missouri, amounting to a violation of the intendment and theory of the establishment of justice, purposed by the Constitution of the United States.

Conclusion.

Each of the questions presented is of grave importance. Unless the opinion below is reviewed, the question of civil rights of the citizen will be left in confusion and doubt.

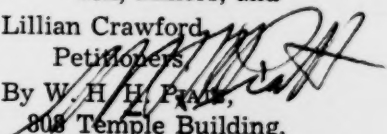
Wherefore, your petitioners pray that a Writ of Certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and proceedings of said Circuit Court of Appeals in the case numbered and entitled on its docket as Number 12435, *Wade S. Thomson et al., Appellants, v. Leta Butler et al., Appellees*, to the end that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States; and that the judgment of the said Circuit Court of Appeals be reversed by this court; and your petitioners pray that the certified copy of the record and proceedings of said Circuit Court of Appeals for the Eighth Circuit filed with this petition, may be treated as a return to said Writ of Certiorari; and your petitioners pray that they may have such other and further remedies

as to the Court may seem just, appropriate and in conformity with law.

Wade S. Thomson,
John W. Thomson,
Courtney L. Thomson,
Oliver C. Thomson,
Myra M. Johnson,
Julia Elizabeth Thomson,
Bertha Thomson,

Guardian for Eugene
Thomson, Huston Thomson
and Calvin C. Thomson,
Minors, and

Lillian Crawford,
Petitioners,

By  W. H. H. Pratt,
808 Temple Building,
Kansas City, Missouri,
Counsel for Petitioners.

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1121 Gloyd Building,
Kansas City, Missouri,
Of Counsel.



BRIEF
IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.

A.

OPINION OF COURT BELOW.

The decision of said Circuit Court of Appeals was filed June 9, 1943, is a final judgment, and is published in the _____ F. 2d _____ (R. 77-85).

B.

GROUND ON WHICH JURISDICTION OF THIS
COURT IS BASED.

These grounds appear as a part of the foregoing Petition for Writ of Certiorari, and are adopted and made a part of this brief.

C.

STATEMENT OF THE CASE.

The proceeding in said Circuit Court of Appeals was an appeal to review a decree of the said District Court at Kansas City, dismissing for want of jurisdiction a suit in equity by infant citizens and residents of Oklahoma with adult citizens and residents of Texas and Indiana, against citizens and residents of Missouri, to prevent the enforcement of a State court judgment, procured by fraud, without service of process, or notice, and to enjoin conspirant producers of a counterfeit Will by them probated and prosecuted as its chief beneficiaries to a judgment, under which petitioners had their rights and property taken without due process of law, in violation of Section 1

of the 14th Amendment to the Constitution of the United States (R. 1-8).

The judgment described in the complaint arose out of a strange and sudden death on March 6, 1936, at Slater, Missouri, of Laura E. Saltonstall, age 68, a childless widow, devoted to her kin, survived by brothers, sisters, nephews and nieces, of whom are your petitioners. She lived alone in her home with respondent, Laura Thomas Sheppard, a boarder, quasi-ward and domestic, of no kin, and on March 5, 1936, was in good health, visiting with 2 nephews, one in morning and other at night, referred to certain property given her in Trust by her father, for her brothers and sisters and surviving children, said she had already made that provision in her Will, and, opening her trunk, a bed-room repository for her valuables, took therefrom a Will dated October, 1935, read it to her nephews, replaced it in her trunk, locked it, remarking it would be there when needed, and hung the key around her neck (R. 5). Next day, Friday, March 6, 1936, after supper, she was seized with a sudden illness—a doctor was called at dusk, her kin a few doors distant unnotified. Saturday morning, March 7, 1936, as a nephew was going to work, noticing a hearse in front of her home, going in found Undertakers carrying away his Aunt's body and Laura Thomas Sheppard communicating with her co-conspirators the other respondents herein who intruded themselves into possession of the home of decedent and the repository trunk in which her last Will was placed the preceding Thursday night, removed from the trunk money and other property, and later produced a two-dated counterfeit will, witnessed by their chosen undertakers, with respondent, Laura Thomas Sheppard, and Leta Butler and Rozell Griffith, also once quasi-domestics of decedent, and strangers to her blood, as chief beneficiaries and devisees, with Com. P. Storts as Executor (R. 5). Later, a will contest suit was instituted by a nephew of decedent—all blood heirs, including your petitioners, were made parties defendant. Your petitioners,

adult citizens of Texas and Indiana, were brought in by substituted service of an unlawful publication in a local county newspaper; your petitioners, infant citizens of Oklahoma, were, by publication, illegally brought in, a guardian *ad litem* unlawfully appointed for them, without service of summons, petition or notice, when the statutes of Missouri demand they shall be first personally served before they can be in court for any purpose. All of the said Saline County parties knew the whereabouts and post-office address of petitioners herein, and knew that they could be personally served in accordance with the non-resident statute, but they evaded it and the judge of the court did not require it; yet, a judgment was entered against your infant and adult petitioners, divesting all blood heirs, including your petitioners, of their rights, titles and interest in said Estate, not named in said undertaker witnessed document.

Your petitioners, record parties to said suit, and against whom a final judgment was rendered, without lawful service of process or notice, first learned of said proceedings after the mandate from the Supreme Court of Missouri was sent down to the trial court on February 26, 1941 (R. 6).

May 31, 1941, your petitioners, as plaintiffs therein, filed suit in Equity in said District Court at Kansas City, setting out in the complaint (R. 1-10) ultimate and constitutive facts which invoke an application or construction of the Constitution of the United States, namely: Section 2, Article III, Section 3, Article IV, and the 14th Amendment to the Constitution of the United States.

The complaint specifically alleges the acts and conduct of said respondents; how they entered into an unlawful conspiracy to cheat and defraud the heirs of Laura E. Saltonstall; how they did, on March 6, 1936, collusively and wrongfully take possession of the lifeless body of Laura E. Saltonstall, her residence, trunk, and property, destroying her last will, dated in October, 1935, and, after a hasty funeral to prevent the heirs from exhuming her

body, made and produced a bogus will, dating it September 1, 1933, and December 2, 1934, naming themselves as chief beneficiaries, Storts as Executor; how they then presented this forged document to the Probate Court, representing it as her last will and testament; that the Judge of Probate, *ex-parte*, in vacation, admitted it, but failed to make an order of confirmation by the Probate Court in Term-time as required by the statutes of Missouri (Sec. 528, R. S. Mo., 1929, now Sec. 539, R. S. Mo., 1939), causing said attempted probate to become null and void and depriving the Circuit Court of Saline County of jurisdiction, so the rendition of its judgment was a nullity. Nevertheless, the property of your petitioners was taken possession of by respondents, who proceeded to and did make deeds of conveyance to each other, dividing the lands of said estate among themselves; how, with fraudulent pretenses, false and perjured testimony, fictitious and forged documents and other fraud, respondents gained an unconscionable advantage for which reasons they should be enjoined from having the benefits of said judgment and prevented from enjoying the fruits of their iniquity (R. 10).

D.

SPECIFICATIONS OF ERROR.

1. The court below erred in sustaining the rulings, orders and decree of the District Court, and holding that the complaint involved no Federal Question, no violation of Section 2, Article III, or Section 2, Article IV, or of Section 1 of the 14th Amendment to the Constitution of the United States.

2. The court below erred in sustaining the rulings of the District Court, and holding that the Judge of the Circuit Court of Saline County, Missouri, in rendering his judgment, did not act for the State, and did not come under the provisions of the 14th Amendment to the Constitution of the United States.

3. The court below erred in sustaining the rulings of the District Court, and in holding that Frank Bush's sworn statement, adoption of the complaint and application to be made a party plaintiff, with copy of complaint attached to his affidavit, voluntarily, in good faith, made and filed by him with permission of the court, may be abrogated by a later unsworn, unauthenticated, inconsistent, ancillary, purported entry of appearance as a defendant and a \$500 interest from the forged will, with a \$2,000 interest as a plaintiff, which last filing was a trick and a fraud to deceive and mislead the court and affect its jurisdiction, when he was not an indispensable party, had no part in the forgery of the will or other charged frauds, and, under the rules of procedure for District Courts, should have been aligned as an involuntary plaintiff, which amounts to a violation of the intendment of the Constitution of the United States which declares that one of its prime purposes is the establishment of justice.

4. The court below erred in sustaining the rulings of the District Court, and in holding a misconception of the nature of this action, considering it on the basis of a will contest suit, instead of an original action in Equity, whose processes are to prevent the use of the law to effect injustice, to guard rights, privileges and immunities of citizens, and to enjoin and deprive forgers and thieves of their plunder; and applying this misconception in various rulings so that it conflicts with the admitted facts, the statutes and decisions of the courts of Missouri, amounting to a violation of the intendment and theory of the establishment of justice declared by the Constitution of the United States.

E.

SUMMARY OF THE ARGUMENT.

Point I.

The court below should be reversed, because a Federal Question is involved in this case. When property is

taken by a void judgment, procured by fraud, without service of process or notice, and when petitioners are denied equal protection, their rights, privileges and immunities abridged, same are contrary to the guaranties of Section 2 of Article III, Section 2 of Article IV and Section 1 of the 14th Amendment to the Constitution of the United States.

Point II.

Judgment below should be reversed, because the Judge of the State Court was and is the arm of the State, and when he rendered his judgment herein, his act was and is the act of the State, bringing it within the inhibition of the 14th Amendment to the Constitution of the United States.

Point III.

Judgment below should be reversed, because Frank Bush's sworn application to be made a plaintiff, attaching copy of complaint to his affidavit, voluntarily in good faith signed, acknowledged and filed by him in District Court with court's approval, should not be abrogated by a trick, a fraud, by someone filing for him an unsworn, unauthenticated, inconsistent, ancillary, purported entry of appearance as a defendant, in a purposed trick to deceive and mislead the court and affect its jurisdiction, when he is not an indispensable party, had no part in framing the counterfeit will, has only \$500 interest under the forged will, with \$2,000 interest as a plaintiff from the Estate, and, under the rules of procedure for District Courts, should have been aligned as an involuntary plaintiff; and said acts amount to a violation of the intendment of the Constitution of the United States which declares that one of its prime purposes is to establish justice.

Point IV.

Judgment below should be reversed, because of the misconception of the nature of this action, the court considering it on the basis of a will contest suit, instead of an action in Equity whose processes are to prevent the use of the law to effect injustice and deprive forgers and thieves of their plunder, not to conflict with the admitted facts, statutes and decisions of the courts of Missouri, for such is contrary to the intendment and theory of the establishment of justice declared by the Constitution of the United States.

ARGUMENT.

POINT I.

The Judgment Should Be Reversed for the Reason a Federal Question Is Here Involved, Arising by Violations of the Constitution of the United States, namely: Section 2, Article III, Section 2, Article IV, and Section 1 of the 14th Amendment to the Constitution of the United States.

Jurisdiction of the District Court is determined by the allegations of the original complaint, and when it alleges a taking of property without due process of law in violation of the 14th Amendment to the constitution of the United States, it presents a substantial Federal Question. *Mosher v. Phoenix*, 237 U. S. 29-32.

While in *The Proprietors of Bridges v. Hoboken Land and Improvement Company*, 1 Wallace 116, 68 U. S. 142, 17 L. Ed. 571, the Court held it was not necessary to give the exact paragraph of the Constitution.

However, the complaint filed in the District Court at Kansas City, uses the following language;

(1) "This action arises under the Constitution of the United States" (p. 1) (R. 1).

(2) "That said judgment so rendered, given and entered without service of summons or notice to these plaintiffs, and without their knowledge or participation in the trial of said cause, was and is as to said plaintiffs absolutely void, without force or effect, and is in contravention of the due process clause contained in Section 1 of the 14th Amendment to the Constitution of the United States" (p. 18) (R. 8).

(3) "That said judgment in the Circuit Court of Saline County, Missouri, rendered and procured by collusion, perjured testimony, fraud, and forged documents, was and is a fraud upon the courts of the land,

upon these plaintiffs, and contravenes and nullifies the establishment of justice, as defined by the Constitution of the United States" (p. 19) (R. 8).

(4) Throughout the complaint (R. 1 to 10), facts are stated which show want of due process of law, want of equal protection under the law, loss of privileges, immunities, rights, titles and interests for want ~~to~~ due process, clearly showing petitioners were seeking protection under the Constitution of the United States and relying upon its guarantees (R. 1 to 10 and 20 to 28).

The complaint should not have been dismissed. As said in *Wetmore v. Rymer*, 169 U. S. 115-128, 42 L. Ed. 682-686:

"A suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within its jurisdiction, unless the fact, when made to appear on the record, creates a legal certainty of that conclusion."

The complaint presented a substantial Federal Question when it alleged an attempted appropriation or taking of petitioners' property without due process of law, in violation of the 14th Amendment to the Constitution of the United States, *Mosher v. Phoenix*, 87 U. S. 29.

In Equity.

Complaint abounds with equitable reasons and grounds. The District Court as a court of equity had jurisdiction to entertain the complaint and grant relief. In *Simon v. Southern Ry. Co.*, 236 U. S. 115, a similar case and where the complaint alleged fraud and want of notice, Justice Lamar said:

"If that be so, the United States courts by virtue of their general equity powers had jurisdiction to enjoin the parties from enforcing a judgment thus doubly void."

The Supreme Court of the United States has many times held that in similar cases, District Courts have unqualified jurisdiction and in equity cases may restrain the parties where judgments were obtained in State courts by fraud, improper methods, or without service of process or notice, in the following cases:

Gaines v. Fuentes, 92 U. S. 10.

Arrowsmith v. Gleason, 129 U. S. 86.

Marshall v. Holmes, 141 U. S. 589.

Simon v. Southern Ry. Co., 236 U. S. 115.

Wells Fargo v. Taylor, 254 U. S. 175.

Smith v. Apple, 264 U. S. 274.

Chase Nat. Bk. v. Norwalk, 291 U. S. 431-441.

Packing Co. v. Gas Co., 309 U. S. 4-9.

Kelkam v. Md. Casualty Co., 312 U. S. 377-382.

Toucy v. N. Y. Life Ins. Co., 314 U. S. 118-120.

In *Gaines v. Fuentes*, 92 U. S. 10-20, Court said:

"The suit in the Parish Court is not a proceeding to establish a will, but to annul it, as a muniment of title, and to limit the operation of the decree admitting it to probate. It is in all essential particulars a suit for equitable relief—to cancel an instrument alleged to be void and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony."

In *Marshall v. Holmes*, 141 U. S. 589, Court said:

"These authorities would seem to place beyond question the jurisdiction of the federal court to take cognizance of the present suit, which is none the less an original independent suit, because it relates to judgments obtained in other courts. While it cannot require the state court itself to set aside or vacate judgments in question, it may, as between the parties before it, adjudge that Mayor shall not enjoy the inequitable advantage obtained by his judgments."

In *Simons v. Southern Ry. Co.*, 236 U. S. 115, Court said:

"In *Julian v. Central Trust Co.*, 193 U. S. 112, it was held that the existence of equity did authorize an injunction to prevent plaintiff from enforcing his judgment even though it may have been perfectly valid in itself. This is sufficient to show that if in a proper case, plaintiff holding a valid state judgment, can be enjoined by a United States Court from its inequitable use—by so much the more can the federal courts enjoin him from using that which purports to be a judgment, but is in fact an absolute nullity."

POINT II.

The Judgment Below Should Be Reversed Because the Circuit Court of Saline County, Missouri, Was and Is an Arm of the State, and When It Rendered Its Judgment, It Was and Is the Act of the State of Missouri, and Brings This Case Within the Inhibition of the 14th Amendment to the Constitution of the United States.

The intendment of the law of Missouri is that the State assumes responsibility for the acts of its Judicial arm when it announces in Section 38 of Article VI of the Constitution of Missouri and in Sec. 905, R. S. Mo., 1939, that:

"All writs and process issued out of any court of record, shall run in the name of the State of Missouri."

The Judge of the Circuit Court of Saline County, when he rendered and recorded his judgment, clothed with the authority of the State, is and was the State of Missouri as was the Judge in the case of *Kring v. State of Missouri*, 107 U. S. 221; and the same as the Judge in the case of *Pyle v. State of Kansas*, 317 U. S. 213.

In *Chicago, B. & Q. Ry. Co. v. Chicago*, 66 U. S. 226, 41 L. Ed. 979, Justice Harlan, in speaking of the 14th Amendment, said:

"The prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and therefor, whoever by virtue of public position, under a state government, deprives another of any right, prohibited by that Amendment against the privation by the state, violates the constitutional inhibitions; and as he acts in the name of and for the state, and is clothed with the state's power, his act is that of the state. This must be so, as we have often said, or the constitutional prohibition has no meaning, and the state has clothed one of its agents with power to annul or evade it. *Ex parte Virginia*, 100 U. S. 339-346-347; *Neal v. Hopkins*, 118 U. S. 356; *Gibson v. Mississippi*, 162 U. S. 570; *Scott v. McNeal*, 154 U. S. 34."

To the same effect, are:

Virginia v. Rives, 100 U. S. 313-318-347.

Home Tel. Co. v. Los Angeles, 227 U. S. 278.

12 Corpus Juris, pages 1195-1196, Section 961.

Petitioners say that they are entitled to be protected in the manner provided for by the Constitution of the United States, by the Constitution of Missouri, and by the laws of the state in force at the time of the acts set forth in the complaint.

If the statutes of Missouri had been fully complied with, and no fraud on the court committed in the procurement of the judgment, then petitioners herein would have no complaint. It was not the specific acts of the respondents which violated the laws of Missouri, but it was the acts of the court who represented the judicial branch of the state, which crystallized the acts of the parties into a judgment; and it is this judgment, which can only be enforced by the state, that absorbs the rights and properties of petitioners; therefore, it stands out beyond question or contradiction, that the judgment, the final act of the state, is the means by which petitioners herein have been denied equal protection of the laws and their rights and properties have been taken; and it is these

acts, according to the Constitution of the United States, which are prohibited. Thus, all of the fraudulent acts of the individuals, comprised within the litigation, have been crystallized into the one act of the state, that of rendering the judgment.

Justice Strong, in *Virginia v. Rives*, 100 U. S. 313, 318, 347, in discussing the application of the Amendment, says:

"The constitutional provisions, therefore, must mean that no agency of a state, or the officers or agents by whom its powers are exerted, shall deny to any person equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts in the name of and for the state, his act is that of the state. This must be so, or the constitutional prohibition has no meaning."

POINT III.

The Judgment Below Should Be Reversed for the Reason That Frank Bush's Sworn Statement, Application to Be Made a Plaintiff and Adoption of the Complaint, a Copy of Which He Attached to His Affidavit, All Voluntarily in Good Faith Made and Filed by Him by Permission of the District Court May Not Be Abrogated by a Later Unsworn, Inconsistent, Contemptuous, Ancillary, Purported Entry of Appearance As a Defendant, in Purposed Trick to Deceive the Court and Divest It of Jurisdiction, When He Is Not an Indispensable Party, and, under the Rules of the Procedure for District Courts, Should Be Aligned As an Involuntary Plaintiff.

The Circuit Court of Appeals held that the trial court properly held that the necessary diversity of citizenship was lacking to give a Federal Court jurisdiction on that

ground (R. 78). The opinion continues in a lengthy inaccurate specious *obiter* argument, glossing and overlooking the trick and contempt of court, had and perpetrated by Frank Bush, to defeat jurisdiction (R. 78-81).

Frank Bush, citizen of Oklahoma \$2,000 blood heir interest in the estate, \$500 legatee in the forged will, being informed of the District Court order to make all heirs and legatees parties, read the complaint, examined photostat of the will, pronounced it a forgery and counterfeit, voluntarily on oath by entry of appearance filed November 3, 1941 (R. 35), adopted and annexed the complaint, prayed to be a party plaintiff, stated he did not want a legacy in a forged will. On the eve of trial six months later, April 20, 1942, his brother, William Bush, Kansas City attorney, unenrolled on the court roster, served and filed (R. 36-37), with leave, an unauthenticated, unsworn withdrawal, recantation, repudiation, rescission and abjuration of his sworn adoption of the complaint, entry of appearance and prayer as plaintiff. Interrogation of Bush by the court was not had, and was denied to counsel for plaintiff; defendants' counsel, like the master bird dog with head high taking the scent from the air, immediately advantaged themselves of the offside forward pass and trick play, by filing their motion to dismiss for incomplete diversity of citizenship (R. 38-9-40), on the same day at which plaintiff filed motion (R. 41-46) to set aside the order permitting the Frank Bush trick and contempt of court. The opinion misconceives the nature of the action as a statutory will contest, instead of an action in equity to deprive forgers and thieves of their plunder; and, by *obiter*, holds (R. 80) Frank Bush "could not, under Missouri law, be a proper party plaintiff" to prosecute the forgers of the will, of their making, that gives him a legacy of \$500 but disinherits him of \$2,000. Equity is the judicial process to prevent using the law to effect injustice. The ordained purpose of the Constitution does not permit tricking the court of jurisdiction to effect jus-

tice or deprive a party of his day in court, nor the aligning of purity with pollution, or honesty and righteousness, with thievery and perjury. Holding, that Frank Bush, innocent legatee of perjury and forgery, may not assail it, but must uphold it and defend it, makes equity impotent, dethrones the blinded Goddess of Justice and enthrones Beelzebub.

Jurisdiction is the judicial soul of jurisprudence, the Immortality of Justice, and untrickable.

Bush Not an Indispensable Party.

The complaint is against Com P. Storts, Leta Butler, Rozell Griffith and Laura Thomas Sheppard as conspirant producers of a counterfeit will, and nowhere in the complaint is there any charge made against Frank Bush, or any other legatee, as having any part in said fraud and conspiracy; therefore, Frank Bush is not a proper, a necessary, nor an indispensable party to this action.

The court sustained defendants' motion to dismiss, delimited, to incomplete diversity of citizenship of necessary parties, upon Frank Bush's *ipsa dixit* corrupt switch to a party defendant. Only indispensable parties, so made by the complaint, fix the jurisdiction. Wishes, whims, nor tricks of sordid interests do not determine indispensability.

Ancillary.

When a case is before the court with proper parties, then other parties, who if they had been originally made parties, may on their own application come into the case without affecting the jurisdiction of the court. This exception is based on the fact that such complaint or application is an intervention, and would only be ancillary to the main suit, in which event, diversity of citizenship is not necessary to confer jurisdiction. *Wichita R. & L. Co. v. Pub. U. Com.*, 260 U. S. 48, 67 L. Ed. 124-128; Equity Rule 37; Rule 8 (a) (1), Rules of Civil Procedure for District Courts.

The bringing in of new parties under the rule is subject to the proviso that joinder of such new parties must not defeat the federal jurisdiction. *Lowery Co. v. Nat'l City Bank*, 28 F. 2d 895. Therefore, the court should have either dismissed Bush's second application, or made him an involuntary plaintiff, as provided in Rule 19 (a), Rules of Civil Procedure for District Courts.

Citizenship Not Essential.

When a federal question is the basis of jurisdiction, the citizenship of the parties is not material nor essential to vest jurisdiction in the court. *Mosher v. Phoenix*, 287 U. S. 29, 77 L. Ed. 148.

Furthermore the right to raise the jurisdictional question is a privilege personal to the party being sued out of his own state, and cannot be raised by co-defendants. *Camp v. Gress*, 250 U. S. 308, 63 L. Ed. 997; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. Ed. 98; *St. Louis Ry. Co. v. McBride*, 141 U. S. 131, 35 L. Ed. 659, 661.

POINT IV.

The Circuit Court of Appeals Erred in Misconceiving the Nature of This Action in the District Court, Considering It on the Basis of a Statutory Will Contest, Instead of an Original Action in Equity, to Prevent the Law from Forcing Injustice, Guard Rights, Protect Privileges and Immunities of Citizens of the United States, and to Enjoin and Deprive Forgers and Thieves of Their Plunder Taken under the Mantle of an Official Act of the State; and Said Misconception of the Court Is Extended to the Application of the Facts, to the Statutes and the Decisions of the Courts of Missouri.

The complaint is not a suit to contest a will. It is an action in Equity, appealing to the Constitution of the United States for protection against its violation in the taking of property without due process of law and disre-

garding rights, titles, privileges and immunities of citizens of the United States; and to enjoin wrong doers from enjoying the fruits of their iniquity.

The complaint (R. 1 to 10) names four parties, namely: Com. P. Storts, Leta Butler, Rozell Griffith and Laura Thomas Sheppard as conspirant manufacturers and producers of a counterfeit will, who, in order to effectuate their purpose to cheat and defraud the heirs of Laura E. Saltonstall, took possession of her lifeless body, home and property, took money and other property from the locked trunk, destroyed testatrix' 1935 will, which gave the property to her brothers, sisters and their children, among whom are petitioners, and substituted therefor a bogus paper, with two dates, as the will of testatrix, wherein Leta Butler, Rozell Griffith and Laura Thomas Sheppard, all strangers to her blood, are the chief beneficiaries and devisees. Against only these four parties is relief asked, they being the only indispensable parties to the cause (R. 1-10).

No relief is asked against Frank Bush or other heirs at law, because they are not involved in the frauds or perjury and had no part in manufacturing the counterfeit will, and are not affected by a judgment against the four respondents. Frank Bush at the time of the contest suit was incapable of being a party therein, because his mother was alive. However at the time of the institution of the action in Equity, his mother was dead; and he was then a legal heir and, with all other legal heirs, innocent of the charged wrong doing, alleged against the four respondents. None of said heirs at law should either in Equity or in law, be made to defend or uphold a forged document.

By the ruling of this opinion, Frank Bush and all other devisees and legatees, innocent of forgery or perjury, become and are accessories after the fact, and must uphold and defend the admitted forgery and perjury and suffer real loss by abandoning their interest in the estate, which is four times greater than they can receive under the counterfeit will.

The rules applicable to the facts in an Equitable proceeding should not be confused with rules of law applicable to facts in a will contest suit. The confusion doubtless resulted in attempting to apply the law regulating will contest suits, which were presented to show that in the will contest suit, where the judgment was obtained, the law had been violated, resulting in no service of summons, no notice, and no due process of law and therefore a violation of the Constitution of the United States.

The statutes of Missouri declare a certain rule. The courts of Missouri construe that statute and give its intended meaning, while this opinion emasculates both of them.

Missouri Constitution and Statutes.

The judgment of the Circuit Court of Saline County, Missouri, violated and contravened Sections 4-10-30 of Article II of the Constitution of Missouri, and also Sections 306-528-716-724-727-728-741-748 of the Revised Statutes of Missouri, for the year 1929, then in force at the time the matters complained of herein transpired.

Refusal by the state court to apply the constitutional and statutory provisions of the law, in force at the time, is a denial of due process, and equal protection of the laws, guaranteed by the United States Constitution. *Kring v. State of Missouri*, 107 U. S. 221; *Pyle v. State of Kansas*, 317 U. S. 213.

Sec. 306, R. S. Mo., 1929, on Descents and Distributions:

“When any person having title to any real estate of inheritance, or personal estate, shall die intestate, it shall descend and be distributed in parcenary to his kindred * * *”

Sec. 528, R. S. Mo., 1929, on Proof of Wills:

“The Probate Court, or the judge or clerk thereof, in vacation, *subject to the confirmation or rejection*

by the court, shall take proof of last wills and of the date of the death of the testator."

Sec. 716, R. S. Mo., 1929, In Suits Against Infants:

"After commencement of a suit against an infant defendant, *and the service of process upon him*, the suit shall not be prosecuted any further until a guardian for such infant be appointed."

Sec. 724, R. S. Mo., 1929, Suits, how Instituted:

"The filing of a petition in a court of record * * * and suing out of process therein, shall be taken and deemed the commencement of a suit."

Sec. 727, R. S. Mo., 1929, Writs:

"The original writ shall be a summons which shall be directed to the officer to be charged with the execution thereof, and shall command him to summons the defendant to appear in court on the return day of the writ, and at a place to be specified in such writ to answer the petition of plaintiff."

Sec. 728, R. S. Mo., 1929, Writs how Served:

"A summons shall be executed * * * first, by reading the writ to the defendant and delivering to him a copy of the petition; or, second, by delivering to him a copy of the petition and writ * * *"

Sec. 741, R. S. Mo., 1929, Publication to Issue on Return of Non-est:

"When * * * summons shall be issued against any defendant and the sheriff to whom it is directed shall make return that defendant cannot be found, the court being first satisfied that process cannot be served, shall make an order, as is required in said section" (No order was made).

Sec. 748, R. S. Mo., 1929, Service on Non-residents:

"Plaintiff may cause a copy of the petition, with a copy of the summons, to be delivered to each defendant residing or being without the state, at any

place within the United States or their territories, 20 days before the commencement of the term at which such defendants are required to appear; * * * service of process in conformity with this section shall be effectual within the limits of this state as personal service within the state" (No service under this section).

By virtue of Sec. 306, R. S. Mo., 1929, your petitioners are vested with titles to property in Missouri as heirs of Laura E. Saltonstall, deceased, which were sought to be affected in the state court litigation, at which your infant petitioners were never served with copy of petition and writ as commanded by Sec. 716, R. S. Mo., 1929, and unless and until first so served, the state court had no jurisdiction over them, and was prohibited from proceeding any further. These statutes direct how an infant shall be served, and unless and until strictly complied with, a minor is not in court for any purpose.

Sec. 716, R. S. Mo., 1929, has many times been construed by the courts of Missouri to mean that it shall be a personal service on each minor named as a defendant, and no other kind of service can take an infant into court, and all proceedings without such personal service on such minor, are null and void. In other words, the Court where cause is pending has no jurisdiction, power or authority to make any order or judgment affecting said infants, unless and until such infant has been personally served.

The Court below, in its opinion on the service of infants, was confused and over looked the character of the attempted substitute service of minors. At the commencement of the will contest suit at which time publication was first obtained, the petition filed did not mention the names of these infant petitioners; but later, by an amended petition, each of said infant petitioners was named as a defendant therein. Thus under the first publication, it did not and could not affect or give notice to infant petitioners. The subsequent alias publication re-

quired an order of court before the publication could be legal, but there was no order of court and the attempted publication was null and void.

The Courts of Missouri emphatically declare that infants must be personally served with process as follows:

Westmeyer v. Gallenkamp, 154 Mo. 28, 55 S. W. 231, Court says:

"By a long line of uniform and well construed cases, the doctrine has been well established that infants must be served with process the same as adults, and that unless so served in the manner provided by law, the court has no jurisdiction over them; and the appointment of a guardian *ad litem* for them, without such service, is void, and the proceedings thereon are *coram non judice*. *Hendricks v. McLean*, 18 Mo. 32; *Smith v. Davis*, 27 Mo. 298; *Baumgartner v. Guessfield*, 38 Mo. 37; *Gibson v. Chouteau*, 39 Mo. 537; *Shaw v. Gregorie*, 41 Mo. 407; *Ry. Co. v. Campbell*, 62 Mo. 537-585; *Campbell v. Gas Co.*, 84 Mo. 352; *Fisher v. Sickman*, 125 Mo. 165; *Bogart v. Bogart*, 138 Mo. 419, 40 S. W. 91; and such also seems to be the doctrine established generally by the great weight of authority, 10 Enc. of P. & P. 645. Here, the plaintiffs were infants of tender age. They were not served in the manner provided by law. They never had their day in court. They could neither acknowledge nor waive service of process, by which alone they could be subjected to the jurisdiction of the court, nor could they appear therein to protect an interest, and the cases furnish no authority for holding that the service on them was merely irregular and not void. The judgment of the Circuit Court will be reversed, cause remanded, with directions to enter judgment for plaintiffs in accordance with views expressed in this opinion."

Process must be served on infants in accordance with Sec. 716, R. S. Mo., 1920, otherwise infants are not in court, and all proceedings relative to them are void. *Scott v. Royston*, 223 Mo. 568, 123 S. W. 454; *Captain v. Mississippi Valley Trust Co.*, 240 Mo. 495, 144 S. W. 466.

Scott v. Royston, 223 Mo. 568, 123 S. W. 454-465-467:

"The fifth section contemplates that the copy of the petition and the notice will be served on all parties before the case is submitted to the court at all; and this section (Sec. 716) while providing that the court shall take no steps against a minor defendant until the guardian has been properly appointed, and making it lawful for the court to appoint a guardian for him, presupposes that the minor defendants have been brought before the court according to law for that purpose. But until he is brought into court by a service of the petition and notice upon him—there is not the least warrant either in the statutes, or the common law, or in equity, for any authority in the court to appoint a guardian for him, or to do any judicial act in the premises affecting his rights and estate."

Judgment of State Court Is a Nullity.

The proceedings by probate judge of Saline County, in vacation, not being confirmed by a subsequent order in term-time by Probate Court as required by Sec. 528, R. S. Mo., 1929, vitiates the attempted probation, deprives the Circuit Court of jurisdiction to try the case, and nullifies its attempted judgment.

Callahan v. Huhlman, 343 Mo. 625, 96 S. W. 2d 704-706:

"In effect, in the present case, it is conceded that there was no confirmation of the Probate Court in term-time of the proceedings had before the judge in vacation, relative to the probating of the will in question, therefore, the will was not probated. *Smith v. Estes*, 72 Mo. 310; *Barnard v. Bateman*, 76 Mo. 414; *Snuffer v. Howardton*, 124 Mo. 613, 28 S. W. 166; *Rothwell v. Jamison*, 147 Mo. 601, 610, 49 S. W. 503; *Farris v. Burchard*, 242 Mo. 8, 145 S. W. 825. And not having been probated, the will has never yet become effective. *Farris v. Burchard*, *supra*. Since the contest of a will, or a suit to establish a will, in the

Circuit Court after rejection in the Probate Court is to be considered in effect as an appeal from the Probate Court, it follows that there can be no jurisdiction in the Circuit Court to entertain such suit or appeal, until there is a judgment, probating or rejecting a will in the Probate Court."

Sec. 741, R. S. Mo., 1929, requires *non est* returns to be made and a finding by the trial court before any publication can be lawfully made, and a publication made without *non est* returns, or without said order is void, and renders the judgment rendered therein a nullity. Publication relied on by Respondents was illegal, because it failed to comply with the requirements of the Statute. As said in *Kelly v. Murdock*, 184 Mo. 377, 83 S. W. 437:

"The order of publication was not made in conformity to the statute; therefore, the notice as published, gave the court no jurisdiction of defendants and the judgment founded on it is void."

Tooker v. Leak, 146 Mo. 419, 48 S. W. 638, 642:

"The action of the court, and the grounds of that action are clearly and unmistakably apparent on the face of the record from which it appears that the order of publication was not made under Section 2024, under which it possibly might have been made, and that it was made under Section 2022, without any authority whatever for making it, and having been thus made, without authority of law, the order was void. The defendants were not notified as required by law. The judgment rendered thereon was void."

Matters Overlooked.

In the motion for rehearing herein, on pages 87-92 of the Transcript of the Record, the court's attention was called to matters overlooked; and the overlooking may have been occasioned by misconception of the nature of

the action. As an illustration of said misconception, the court's attention was called to Sec. 716, R. S. Mo., 1929, now Sec. 867, R. S. Mo., 1939, which is in a separate Article 2, headed "Infants as Parties" and declares as follows:

"After commencement of a suit against an infant defendant, and the service of process upon him, the suit shall not be prosecuted any further until a guardian for such infant be appointed."

Our courts declare this statute means that the infant shall be personally served before anything else can be done and unless so personally served, all proceedings following are void. *Westmeyer v. Gallenkamp*, 154 Mo. 28, 55 S. W. 231; *Scott v. Royston*, 223 Mo. 568, 123 S. W. 454, 467.

Your petitioners, infant citizens of Oklahoma, are citizens of the United States, and, by the United States Constitution, Section 2, Article IV, and Section 1, the 14th Amendment, are guaranteed immunities, privileges and rights in the Missouri courts the same as infant citizens of Missouri are accorded therein. *Kring v. State of Missouri*, 107 U. S. 221; *Pyle v. State of Kansas*, 317 U. S. 213 (2).

Admitted Facts.

Respondents' motion to dismiss the cause for want of jurisdiction, and their approval and adoption of Frank Bush's appearance and withdrawal, admits and confesses, as true, the factual averments of the complaint, and authorizes entry of judgment for petitioners, enjoining respondents from taking, keeping or having the benefits of the judgment.

Conclusion.

We respectfully submit that the Federal Question involved in this case is substantial, and calls for the exercise by this Court of its supervisory powers, by granting

a Writ of Certiorari and thereafter reviewing and reversing the decision of the said Circuit Court of Appeals.

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SEP 18 1943

CHARLES EMMORE CROPLEY
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In the
Supreme Court of the United States
October Term, 1943.

No. 281.

WADE S. THOMSON, JOHN W. THOMSON, COURTNEY L.
THOMSON, OLIVER C. THOMSON, MYRA M. JOHNSON,
JULIA ELIZABETH THOMSON, BERTHA THOMSON,
Guardian for Eugene Thomson, HUSTON
THOMSON, CALVIN C. THOMSON, Minors,
and LILLIAN CRAWFORD, *Petitioners*,

vs.

LETA BUTLER, ROZELL GRIFFITH, LAURA THOMAS SHEPPARD
and COM P. STORTS, Executor, *Respondents*.

**BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

HENRY N. ESS,
CHAS. E. WHITTAKER,
of Kansas City, Missouri,
Attorneys for Respondents.



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In the
Supreme Court of the United States
October Term, 1943.

No. 281.

WADE S. THOMSON, JOHN W. THOMSON, COURTNEY L.
THOMSON, OLIVER C. THOMSON, MYRA M. JOHNSON,
JULIA ELIZABETH THOMSON, BERTHA THOMSON,
Guardian for Eugene Thomson, HUSTON
THOMSON, CALVIN C. THOMSON, Minors,
and LILLIAN CRAWFORD, *Petitioners*,

vs.

LETA BUTLER, ROZELL GRIFFITH, LAURA THOMAS SHEPPARD
and COM P. STORTS, Executor, *Respondents*.

**BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

Petitioners seek a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Eighth Circuit, affirming a final decree of the District Court of the United States for the Western Judicial District of Missouri dismissing this action for want of jurisdiction.

The opinion of the Circuit Court of Appeals is reported in 136 F. (2d) 644.

The opinion of the Federal District Court is not reported, but is found at page 47 of the Record.

The petition does not specifically bring forward any question for consideration, and the supporting brief is not direct nor concise, and therefore both violate Paragraph 2 of Rule 38 of the Rules of this Court and the many cases therein cited, and for those reasons alone certiorari should be denied.

The Facts.

Rather than attempt to point out the numerous inaccurate statements of petitioners, we choose to make a short and concise statement of the facts of the case.

This action was commenced by the complaint of petitioners filed with the District Court at Kansas City, Missouri, on May 31, 1941, against respondents to annul a judgment of the Circuit Court of Saline County, Missouri, rendered November 20, 1937 (affirmed September 27, 1940, by the Supreme Court of Missouri on appeal to that court—*Thomson v. Butler et al.*, 147 S. W. [2d] 437), finding a contested will to be the last will and testament of Laura E. Saltonstall, deceased, and to enjoin the beneficiaries under that will, so established, from receiving the legacies given them thereby, and to obtain a decree declaring that will to be null and void, and enjoining the beneficiaries thereof from claiming anything thereunder.

The Complaint.

The complaint alleged first that "this action is of a civil nature, a controversy between citizens of different states, arises under the Constitution of the United States,

and exceeds, exclusive of interest and costs, the value of three thousand dollars'' (R. 1). It next alleged that five of the plaintiffs are citizens and residents of the State of Texas, that one of the plaintiffs is a citizen and resident of the State of Indiana, and the rest of the plaintiffs are citizens and residents of the State of Oklahoma (R. 1-2). It next alleged that the named defendants are citizens and residents of the State of Missouri (R. 2).

The complaint then alleged that one of the plaintiffs is a niece and the remainder are grandnephews and grandnieces of Laura E. Saltonstall (R. 2); that Laura E. Saltonstall died March 6, 1936, in, and a citizen and resident of, Saline County, Missouri (R. 5); that plaintiffs, as blood relatives of Laura E. Saltonstall, are some of those who were her heirs under the intestacy laws of Missouri (R. 2); that Laura E. Saltonstall left a will made in October, 1935 (R. 5); that on her death defendants Butler, Griffith and Sheppard destroyed the will made in October, 1935 (R. 5), and conspired with defendant Storts to, and they did, substitute for the October, 1935, will a forged will "of 1933 and 1934" (R. 5-6) under which defendants Butler, Griffith and Sheppard were the "chief beneficiaries" (R. 4). They allege that defendants offered the forged will for probate and it was admitted to probate in the Probate Court of Saline County, Missouri (R. 6).

They allege that thereafter one Price M. Thomson, an heir at law of the deceased, instituted in the Circuit Court of Saline County, Missouri, a suit to contest the alleged forged will (R. 3). That the named defendants in that case were Butler, Griffith and Sheppard (respondents here) (R. 3). They allege that the will contest case resulted in a judgment establishing the alleged forged will as the true will of Laura E. Saltonstall (R. 3-4), and that the judgment was affirmed on appeal by the Supreme Court of Missouri (R. 4).

They allege that the judgment of said Circuit Court, finding the contested will to be the true last will of the deceased, was obtained "upon false testimony, forged documents and illegal evidence" and by "false and forged evidence and perjured testimony of the existence of a will dated September 1, 1933, and December 2, 1934" (R. 4).

They allege that none of the plaintiffs had any notice of, or were served with process in, or appeared in, or were parties to, the will contest suit (R. 6-7), and that by reason thereof the judgment in that proceeding was void as to them and "in contravention of the due process clause contained in Section 1 of the Fourteenth Amendment to the Constitution of the United States" (R. 8).

The relief prayed was that the judgment of the Circuit Court, finding the contested will to be the last will and testament of deceased, be annulled; that the beneficiaries under that will and judgment be enjoined from enjoying the fruits thereof; and that the will established by the judgment of said Circuit Court be declared null and void, and that all legatees and devisees be enjoined from claiming anything thereunder (R. 9-10).

Respondents' Answer.

In respondents' answer, among other things, they set up, under paragraph 27 (R. 19), that there was a defect of parties defendant, in that all of the persons claiming under the decedent's will established by said judgment were not before the court and were necessary parties to the suit.

Respondents' Oral Motion to Dismiss for Want of Necessary Parties.

The case came on for trial on October 27, 1941 (R. 31). Counsel for petitioner made his opening statement to the court, after which counsel for respondents moved to dis-

miss for want of necessary parties, as alleged in paragraph 27 of their answer (R. 32). The court took the motion under submission, giving petitioners forty-five days' time to make the legatees and devisees named in the established will parties to the suit, saying (R. 34): "If they are not made parties and brought into the case, then the motion to dismiss will be ruled." Respondents' counsel then questioned the jurisdiction of the court if those legatees and devisees be brought in (R. 33-34), and the court said: "When they have been made parties, then whether the court has jurisdiction of the case will be considered upon motion" (R. 34).

Addition of Frank Bush as a Party.

One of the legatees named in the established will was Frank Bush, of Oklahoma. On November 3, 1941, he entered his appearance and asked to be made a party plaintiff (R. 35). On April 20, 1942, he filed a withdrawal as a party plaintiff and entered his appearance as a party defendant (R. 36, 37, 38) and by order of that date was permitted to do so (R. 48).

Respondents' Motion to Dismiss for Lack of Jurisdiction.

On April 24, 1942, respondents filed their verified motion to dismiss (R. 38) upon the ground that the defendant Frank Bush is and at all times mentioned in the suit was a citizen and resident of the State of Oklahoma; that four of the plaintiffs are and were at all times mentioned in the suit citizens and residents of the State of Oklahoma; and therefore there is not complete diversity of citizenship between the plaintiffs, on the one hand, and the defendants, on the other hand, and that the case is not one in the character of which

district courts of the United States are given original jurisdiction and that the court is without jurisdiction of the cause.

Petitioners on the same day filed their motion to set aside the order of April 20, 1942, permitting Frank Bush to withdraw as a party plaintiff and to enter his appearance as a defendant (R. 41).

On May 9, 1942, both of these motions were taken up before the court, evidence was offered, arguments were heard, and the motions taken under advisement (R. 46).

Opinion, Judgment and Decree of the District Court.

On May 13, 1942, the District Judge filed his memorandum opinion, judgment and decree (R. 47-50), finding that though Frank Bush was not an heir of Laura E. Saltonstall, he was a legatee in her will established in the Circuit Court of Saline County, Missouri, and is one of those whom petitioners seek to enjoin from claiming anything under that will and as to whom it is prayed that the will be declared null and void; that his only interest is that of a defendant; that it is immaterial whether he calls himself plaintiff or defendant, for if he stays in as a plaintiff, he must, on a question of jurisdiction, be realigned as a defendant, and therefore petitioners' motion to set aside the order of April 20, 1942, is without significance and is overruled. The court then found that some of the plaintiffs are citizens and residents of Oklahoma, and also that defendant Frank Bush is a citizen and resident of Oklahoma, and hence there is not complete diversity of citizenship, and that respondents' motion to dismiss must be sustained, absent some other ground of jurisdiction than diversity.

The court then referred to petitioners' contention that, inasmuch as they were not served with process in, or notified of, and did not appear in, the will contest suit, the judgment of the Circuit Court of Saline County, Missouri, took their property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and held that under the law of Missouri petitioners were not entitled to be made parties to that proceeding unless they asked to intervene, which they did not do, and therefore the judgment of the Circuit Court of Saline County, Missouri, finding the contested will to be the last will of Laura E. Saltonstall, did not take petitioners' property without due process or in any way violate the Federal Constitution, and that the complaint did not state a case arising under the Constitution or laws of the United States.

The court thereupon ordered the complaint dismissed for want of jurisdiction (R. 50).

From this order petitioners appealed to the United States Circuit Court of Appeals for the Eighth Circuit (R. 59). As stated, that court affirmed (R. 77 to 85), finding and holding that:

(1) the trial court properly held that the necessary diversity of citizenship was lacking to give a federal court jurisdiction on that ground; and

(2) the complaint presented no question arising under the Constitution or laws of the United States, and that the trial court was correct in declaring that it had no jurisdiction of the suit on the basis of a federal question being involved.

Questions Sought to be Reviewed.

The questions sought to be reviewed are:

1. Whether there was complete diversity of citizenship of plaintiffs, on the one hand, and the defendants, on the other hand; and
2. Whether the complaint alleged a cause of action arising under the Constitution or laws of the United States.

Contentions of Respondents.

Respondents contend:

- (1) There was not complete diversity of citizenship between the plaintiffs, on the one hand, and the defendants, on the other hand; and
- (2) The complaint did not allege a cause of action arising under the Constitution or laws of the United States.

I.

The action was not between citizens of different states.

The action as originally commenced was by five citizens and residents of Texas, one citizen and resident of Indiana, and five citizens and residents of Oklahoma (R. 1-2) against four citizens and residents of Missouri (R. 2) to annul a judgment of the Circuit Court of Saline County, Missouri, finding a certain will to be the last will and testament of Laura E. Saltonstall, deceased.

But all the legatees and devisees in that will were necessary parties to a suit to annul the judgment sustaining it. *Eddie v. Parke's Executor*, 31 Mo. 513; *Wells v. Wells*, 144 Mo. 198, 45 S. W. 1095; *Parke v. Smith*, (Mo. Sup.) 211 S. W. 62; *Harper v. Hudgings*, (Mo.

Sup.) 211 S. W. 63. It appeared from the opening statement of counsel for petitioners at the beginning of a trial of the action on October 27, 1941, that all the legatees and devisees named in the will had not been made parties to the action (R. 32). Thereupon, counsel for respondents moved to dismiss for want of necessary parties (R. 32). The court expressed the view that all legatees and devisees in the will were necessary parties to this suit to annul the judgment sustaining it (R. 32), but he did not sustain the motion. He entered an order taking the motion under submission (R. 34) and granted leave to petitioners to make the legatees and devisees named in the will parties to the suit within forty-five days (R. 34), saying: "If they are not made parties and brought into the case, then the motion to dismiss will be ruled," and saying, further: "When they have been made parties, then whether the court has jurisdiction of the case will be considered upon motion" (R. 34).

On November 3, 1941, Frank Bush, a citizen and resident of Major County, Oklahoma, entered his appearance in the case as a party plaintiff (R. 35). Thereafter, on April 20, 1942, he filed a withdrawal as a party plaintiff and entered his appearance as a party defendant (R. 37), and after hearing, was permitted by the court to do so (R. 48). Frank Bush thus aligned himself as and became a defendant in the case on April 20, 1942.

On April 24, 1942, respondents filed their verified motion to dismiss, reciting that the defendant Frank Bush was at the time of the institution of the suit and still is a citizen and resident of the State of Oklahoma, and that five of petitioners were, at the time of the institution of the suit and still are, citizens and residents of the State of Oklahoma, and that therefore there is not complete diversity of citizenship between the plaintiffs, on the

one hand, and the defendants, on the other hand, and the cause is not one in the character of which district courts of the United States are given original jurisdiction, and therefore the court has no jurisdiction of the cause (R. 38). On the same day petitioners filed their motion to set aside the order of April 20, 1942, permitting Frank Bush to withdraw as a party plaintiff and to enter his appearance as a party defendant (R. 41).

On May 9, 1942, both motions were presented to the court, evidence was offered, arguments were made, and the motions taken under advisement (R. 46). On May 13, 1942, the court rendered an opinion (R. 47), finding that Frank Bush is the son of Ruth V. Bush, a sister of Laura E. Saltonstall, and that his mother was living at the death of Laura E. Saltonstall, and that under the law of Missouri he is not an heir of Laura E. Saltonstall and has no interest as such in her estate; that he is however a legatee under her will established in the Circuit Court of Saline County, Missouri, and is one of those whom petitioners seek to enjoin from claiming anything under the will and as to whom it is prayed that the will be declared null and void, and that his only interest in this case is that of a defendant and that it is immaterial whether he calls himself plaintiff or defendant, because, upon a question of jurisdiction, he must be aligned as a defendant, and therefore petitioners' motion to set aside the order of April 20, 1942, was without significance and was overruled (R. 49). The court then held that, inasmuch as some of the petitioners are citizens and residents of Oklahoma and the defendant Frank Bush is a citizen and resident of Oklahoma, there is not complete diversity of citizenship, and the court held that respondents' motion to dismiss because of incomplete diversity was good and must be sustained, absent some

other ground of jurisdiction (R. 49), and finding no other ground of jurisdiction sustained the motion and dismissed the cause (R. 50).

Inasmuch as Frank Bush was a necessary party to the suit, the suit could not proceed until he be brought in as a party; and inasmuch as he was not an heir of Laura E. Saltonstall under the Missouri statutes, but was a legatee under her will and one of those whom petitioners seek to enjoin from claiming anything under that will and as to whom they prayed that the will be declared null and void, his only interest in the case was that of a defendant and he aligned himself as a defendant, which, if he had not done, the court, upon a question of jurisdiction, would have been required to do anyway. *City of Indianapolis v. Chase National Bank of City of New York*, 314 U. S. 63, 69, 62 S. Ct. 15, 17; *Sutton v. English*, 246 U. S. 199; *Thomas v. Anderson*, (8 Cir.) 223 F. 41. So the court's action in refusing to set aside the order of April 20, 1942, permitting Frank Bush to withdraw as a plaintiff and to enter his appearance as a defendant, and in refusing to realign Frank Bush as a plaintiff, was entirely proper.

Frank Bush thus being a defendant in the case and petitioners admitting that he was a resident of the same state as some of the plaintiffs, it clearly appeared that there was not complete diversity of citizenship and the court necessarily was obliged to hold that it had no jurisdiction of the suit on the basis of diversity of citizenship. *City of Indianapolis v. Chase National Bank*, *supra*; *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 71; *DeHanas v. Cortez-King Brand Mines Co.*, (8 Cir.) 26 F. (2d) 233. Certiorari denied 278 U. S. 635.

II.

The action did not arise under the Constitution or laws of the United States.

Where jurisdiction of a district court has been invoked on the ground that the cause arises under the Constitution or laws of the United States, and this is challenged, the issue must be determined by considering the allegations of the complaint. If they disclose a real and substantial question of that nature, there is jurisdiction; otherwise there is none. *Southern Covington Ry. Co. v. Newport*, 259 U. S. 97, 99. A mere formal statement that such question exists does not suffice. The allegations must show that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution or some law of the United States. *Southern Covington Ry. Co. v. Newport*, *supra*. Such jurisdiction cannot rest upon inference, argument or anticipated defense. *Mathers v. Urschel*, (10 Cir.) 74 F. (2d) 591, 593.

The only mention made in the complaint of the Constitution or laws of the United States is that found in Paragraph 1 (R. 1), where it is alleged that "the action arises under the Constitution of the United States," and in Paragraph 18 (R. 8), where it is alleged that the judgment of the Circuit Court upholding the will "was and is as to said plaintiffs absolutely void, without force or effect, and in contravention of the due process clause contained in Section 1 of the Fourteenth Amendment to the Constitution of the United States," and in Paragraph 19 (R. 8), where it is recited that said judgment "was and is a fraud upon the courts of the land, upon these plaintiffs, and contravenes and nullifies the establishment of justice as defined by the Constitution of the United

States, is inequitable, unjust and may not be permitted."

Not only is there no averment in the complaint which shows that the suit is one that really and substantially involves a dispute or controversy as to a right which depends on the construction or application of the Constitution or some law of the United States, but, moreover, the averments of the complaint show affirmatively that there is no question of any nature in the case arising under or involving an interpretation of the Constitution or laws of the United States.

From the charge in the complaint that petitioners were not served with process in, had no notice of, and did not participate in nor become parties to, the will contest suit (R. 6, par. 12; R. 7, par. 17; R. 8, par. 18) petitioners argue that their property was taken without due process in violation of Section 1 of the Fourteenth Amendment to the Constitution. There are numerous answers to that claim.

One is: Petitioners were not necessary parties to that suit. The right to contest a will is entirely dependent upon statute and in no way upon the Constitution or any law of the United States. *Campbell v. St. Louis Union Trust Co.*, 346 Mo. 200, 139 S. W. (2d) 935. We have a statute in Missouri relative to the contest of wills. It is Sec. 538, R. S. Mo. 1939, and reads as follows:

"Who May Contest Validity of Will, and How.

If any person interested in the probate of any will shall appear within one year after the date of the probate or rejection thereof, and, by petition to the circuit court of the county, contest the validity of the will, or pray to have a will proved which has been rejected, an issue shall be made up whether the writing produced be the will of the testator or not, which shall be tried by a jury, or if neither party require a jury, by the court."

This statute permits "any person interested" in the probate of a will to contest the validity of the will by suit in the circuit court of the county, instituted within one year from the date the will is probated. The phrase "any person interested in the probate of any will" as there used means any person who has a direct pecuniary interest in the probate of the will at the time the will is admitted to probate. *Campbell v. St. Louis Union Trust Co.*, *supra*; *Jensen v. Hinderks*, 338 Mo. 459, 92 S. W. (2d) 108.

Within one year after the will was admitted to probate Price M. Thomson, an heir of Mrs. Saltonstall under the laws of descent of Missouri (R. 7, 21, 47) and therefore a "person interested in the probate of" her will, filed a suit in the Circuit Court of Saline County, Missouri, to contest the will. The complaint here alleges that the defendants named in that suit were Leta Butler, Rozell Griffith and Laura Thomas Sheppard, three of the respondents here (R. 7). The complaint and the reply here allege that said cause came on for trial on November 15, 1937, before the Circuit Court of Saline County, Missouri, and a jury, and resulted in a verdict and judgment on November 20, 1937, finding the contested will to be the last will and testament of Laura E. Saltonstall, deceased. Price M. Thomson appealed from that judgment to the Supreme Court of Missouri, which affirmed the judgment (R. 4, 22, 23). The opinion of the Supreme Court of Missouri affirming the judgment is reported in the case of *Thomson v. Butler et al.*, 147 S. W. (2d) 437.

These petitioners, or any one of them, being persons interested in the probate of the will, could have, had they or he chosen to do so, filed a suit in said Circuit Court to contest the will within the time allowed, or could have intervened in the suit brought by Price M. Thomson to contest the will, but they allege here that they did neither.

It is well settled in Missouri that persons, who, like petitioners, are not legatees or devisees in the contested will, and who might have an interest in the estate only if the will be set aside, are not necessary parties, either plaintiff or defendant, to a suit to contest the will. In Missouri the only necessary parties to a suit to contest a will are the legatees and devisees under the will. *Ehrlich v. Mittelberg*, 299 Mo. 284, 301, 252 S. W. 671; *Kischman v. Scott*, 166 Mo. 214, 224, 65 S. W. 1031; *Wells v. Wells*, 144 Mo. 198, 202; *Eddie v. Parke's Executor*, 31 Mo. 513; *Park v. Smith*, (Mo. Sup.) 211 S. W. 62.

Inasmuch as petitioners were not legatees or devisees under the will, they were not necessary parties to the suit filed by Price M. Thomson to contest it. Hence, the allegation in the complaint here, that petitioners were not served with process in, notified of, or made parties to the will contest suit, raised no federal question and does not in any way tend to show that the judgment in that case infringed upon any rights of petitioners guaranteed by Section 1 of the Fourteenth Amendment to the Constitution, because under the law they were not necessary parties to the suit.

A second answer is: That even if the Missouri law were otherwise, and made all those who would be heirs at law of the deceased, had she died intestate, necessary parties to a suit to contest her will, but they were not made parties, served with process and given an opportunity to be heard in such a suit, it is clear that any adverse judgment would be simply void as to them. As to them it would be as though no suit had been filed, and whatever rights they had would still obtain, and even in that situation no right or property of theirs would be taken by the judgment and the due process clause of the Fourteenth Amendment would not be in any way involved.

A third answer is: That petitioners concede in this Court that they were named defendants in the will contest suit and that publication service was had upon them (p. 13, petitioners' brief), but they argue that the service was invalid, contending that valid service upon such of them as were minors was obtainable only by personally serving them with writ and petition, under Sec. 748, R. S. Mo. 1929 (now Sec. 900, R. S. Mo. 1939). Under the law of Missouri, suits to contest a will in the circuit court are *in rem* proceedings. *State ex rel. Mitchell v. Gideon*, 215 Mo. App. 46, 237 S. W. 220; *McCrary v. Michael*, 233 Mo. App. 797, 109 S. W. (2d) 50; *Campbell v. St. Louis Union Trust Co.*, 346 Mo. 200, 139 S. W. (2d) 935, 129 A. L. R. 316. The Missouri statute (Sec. 891, R. S. Mo. 1939) provides for service of process by publication on nonresident defendants in action *in rem* when the plaintiff makes a positive allegation in his petition or by affidavit that a defendant is a nonresident and cannot be served in the state. The provisions of the Missouri statutes as to form and service of process are applicable alike to infants and adults, except there can be no voluntary acknowledgment of service by or on behalf of an infant. *Weber v. Weber*, 49 Mo. 45; *Baumgartner v. Guessfeld*, 38 Mo. 36. Petitioners make the argument that under Sec. 748, R. S. Mo. 1929 (now Sec. 900, R. S. Mo. 1939), those of them who were infants could be validly served only by personal service; but it is plain that said section provides merely an alternative method to that of publication under Sec. 891, and may optionally be made "in any of the cases mentioned in Sec. 891." It thus appears that petitioners were in fact defendants in, and validly served with process in, the will contest suit, though they were not necessary parties to the suit.

Petitioners further argue that because of the charges of fraud, forgery and perjury contained in the complaint,

the petition stated a cause of action within the *equity* jurisdiction of the federal district court. They confuse, however, the distinction between *equity jurisdiction* and *federal court jurisdiction*. We do not deny that federal courts, if they have jurisdiction of a case *as a federal court* under Sec. 24 of the Judicial Code, *have equity jurisdiction* to restrain parties from receiving the fruits of a judgment obtained in a state court by extrinsic fraud. In other words, if the court has federal jurisdiction—that is to say, the suit involves more than three thousand dollars and arises under the Constitution or laws of the United States or is between citizens of different states—then the court has *equity jurisdiction* to enjoin the parties from receiving the benefits of a judgment obtained in a state court by extrinsic fraud. But first, of course, the federal court must have federal jurisdiction—that is, power to hear the case.

The due process clause of the Fourteenth Amendment is not a guarantee against the use or results of perjury or fraud by parties to private litigation in state courts, uncounseled by the general standards and processes of the state court system, nor does it afford a constitutional basis for relief in the federal courts from a judgment in such litigation obtained by these means. The rule announced in *Pyle v. State of Kansas*, 317 U. S. 213, and in *Mooney v. Holohan*, 294 U. S. 103, and similar cases, on which petitioners rely, applies only to public litigation in which authorities of the state, with responsibility for the litigation, have committed or countenanced a fraud or fundamental unfairness or other pollution of the judicial process, which has entered into a deprivation of life, liberty or property by the state. There is no violation of the Fourteenth Amendment in private litigation, *even*, because the result is erroneous or unjust or

has been achieved by improper practices, where the state's judicial processes are such as, on the basis of recognized principles, have afforded the parties a fair opportunity for hearing and determination by the court. *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 58 S. Ct. 185; *Central Land Co. v. Laidley*, 159 U. S. 103, 16 S. Ct. 80. If the law were otherwise it would be open to defeated litigants to maintain suits in the federal court to retry, upon a charge of fraud or error, all cases tried and determined in state courts.

Petitioners complain also at various places in their brief that the State of Missouri, by the judgment in the will contest suit, deprived them of the privileges and immunities accorded citizens of Missouri, in violation of Article IV, Sections 1 and 2, of the Fourteenth Amendment to the Constitution.

Not only does the complaint fail to make any reference to these provisions of the Constitution or to set forth any facts showing denial of any rights within them, or to raise any question (to say nothing of a real and substantial one) dependent upon them, but, on the contrary, the complaint affirmatively shows that no constitutional or federal question is involved.

For these reasons there is no support for petitioners' claim that they were denied due process or any right guaranteed them by the Constitution or laws of the United States.

Respondents respectfully submit that there is no merit in any of petitioners' contentions, and that certiorari should be denied.

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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 281.
CIVIL.

WADE S. THOMSON, JOHN W. THOMSON, COURTNEY
L. THOMSON, OLIVER C. THOMSON, MYRA M. JOHN-
SON, JULIA ELIZABETH THOMSON, BERTHA THOM-
SON, GUARDIAN FOR EUGENE THOMSON, HUSTON
THOMSON, CALVIN C. THOMSON, MINORS, AND
LILLIAN CRAWFORD, PETITIONERS,

VS.

LETA BUTLER, ROZELL GRIFFITH, LAURA THOMAS
SHEPPARD AND COM. P. STORTS, EXECUTOR,
RESPONDENTS.

PETITION FOR REHEARING
and
BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 281.

CIVIL.

WADE S. THOMSON, JOHN W. THOMSON, COURTNEY
L. THOMSON, OLIVER C. THOMSON, MYRA M. JOHN-
SON, JULIA ELIZABETH THOMSON, BERTHA THOM-
SON, GUARDIAN FOR EUGENE THOMSON, HUSTON
THOMSON, CALVIN C. THOMSON, MINORS, AND
LILLIAN CRAWFORD, PETITIONERS,

VS.

LETA BUTLER, ROZELL GRIFFITH, LAURA THOMAS
SHEPPARD AND COM. P. STORTS, EXECUTOR,
RESPONDENTS.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and Associated Jus-
tices of the Supreme Court of the United States:

Your Petitioners, in support of their Petition for Re-
hearing, on their Petition for Writ of Certiorari, to review

the final judgment of the United States Circuit Court of Appeals for the Eighth Circuit, affirming a decree and orders of the District Court for the Western Division of the Western District of Missouri, at Kansas City, respectfully show:

That the Petition for Writ of Certiorari was comprehensive and timely filed; that the original complaint set forth positive violations of the Constitution of the United States and contravention of the 14th Amendment, that it contained a statement of the facts, and prayed for protection and relief, believing your petitioners were justly entitled to the guarantees established by the forefathers.

That this court made no findings when it issued its order, and a denial of the Writ of Certiorari amounts to a refusal of any relief, as well as a decree of this court that it is unwilling to grant your petitioners a day in court, notwithstanding the fact that they never were served as required by law, that the judgment of the State court against them was procured by fraud, was null and void, and their property taken away from them without compensation, without due process of law, and in direct violation of the terms and provisions of the 14th Amendment to the Constitution of the United States.

Your petitioners further state that this court must have overlooked the above facts, and must have overlooked the Rule announced in *Mosher v. City of Phoenix*, 287 U. S. 29 (a corporate entity, empowered to plead and be impleaded same as an individual), wherein this court holds that when the complaint alleges property is attempted to be taken in violation of the 14th Amendment, then a Federal Question is presented, that the District Court erred in refusing jurisdiction, and that in such cases a Writ of Certiorari should issue.

That after your petitioners had properly appealed to this court for Constitutional protection, this court certainly could not have attempted to uphold that fallacious, fictitious and artificial interpretation or construction of the Constitution of the United States placed thereon by the lower court, wherein it held that there is a distinction between an action where the individual is deprived of his Constitutional guarantees, by the state, and an action where the individual is deprived of his Constitutional guarantees, by the State, at the instance of and by the machinations of individuals. This is a distinction without a difference. It is argument without either truth, reason or logic. It is the State acting in both instances. In both instances it is an action by the State. Six of one, and a half-dozen in the other. Such a construction and such a contention is in conflict with the Constitution itself, stifles and undermines that reputed bulwark of individual liberty, and conflicts with the intendment of prior decisions of this court.

That these are important questions and should be clearly and positively decided by this court, freed from different and conflicting constructions, by different courts, and its consequent uncertainty, as is now exemplified by the instant ruling in the 8th Circuit and the rule of the 3rd Circuit in *Publisher v. Shellcross*, 106 F. 2d 959, to the end that all may know the real law from artificial rules of construction and of invisible government, which alike conflict with the law of creation, the Divine Law and ultimate in intolerable government and failure.

Wherefore, your petitioners pray the court for a Rehearing; that later, it shall issue its Writ of Certiorari,

then review and reverse the decision of said Circuit Court of Appeals.

Wade S. Thomson
 John W. Thomson,
 Courtney L. Thomson,
 Oliver C. Thomson,
 Myra M. Johnson,
 Julia Elizabeth Thomson,
 Bertha Thomson,
 Guardian for Eugene Thomson,
 Huston Thomson, Calvin C.
 Thomson, Minors, and
 Lillian Crawford,

Petitioners.

By *W. H. H. Piatt*
 W. H. H. PIATT
 808 Temple Building,
 Kansas City, Missouri,
Counsel for Petitioners.

ERNEST D. MARTIN,
 1121 Gloyd Building,
 Kansas City, Missouri,
Of Counsel.

Certification.

Counsel for petitioners hereby certify that the above Petition for Rehearing is presented in good faith and not for delay.

W. H. H. Piatt
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 Kansas City, Missouri,
Counsel for Petitioners.

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Of Counsel.

BRIEF

IN SUPPORT OF PETITION FOR REHEARING.

SUMMARY OF THE ARGUMENT.

POINT I.

The Court erred because it failed to follow the Rule laid down in prior decisions of this Court.

POINT II.

The Court erred because it must have followed the fallacious and artificial interpretation, application and construction of the Constitution of the United States placed thereon by the court below, which construction is antagonistic to and undermines the Constitution itself, violates the rules of Equity, and is contrary to and conflicts with the intendment of prior decisions of this Court.

ARGUMENT.

POINT I.

This Court, in making its order denying the Writ herein, must have overlooked the rule announced by this Court in *Mosher v. Phoenix*, 287 U. S. 29-32, 77 L. Ed. 148, where the court said:

Syl. 1. "Jurisdiction of the District Court upon the ground of a federal question, is determined by the allegations of the bill and not by the way the facts turn out or by decisions on the merits."

Syl. 2. "Where a bill complaining of attempted appropriation of plaintiff's land by a City * * * without authority from State law, deprives plaintiff

thereof without compensation or condemnation proceedings, and without due process of law in violation of the 14th Amendment, a substantial federal question is presented."

Which opinion, after citing with approval, *Cuyahoga Power Co. v. Akron*, 240 U. S. 462, 60 L. Ed. 743, 36 S. Ct. 402; *Fidelity & D. Co. v. Tafoya*, 270 U. S. 426-434, 70 L. Ed. 664-667, 40 S. Ct. 331; *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U. S. 239-246, 76 L. Ed. 265-272, 52 S. Ct. 133, does most emphatically assert:

"We are of the opinion that the allegations of the bills of complaint that the City acting under color of State authority was violating the asserted private rights secured by the Federal Constitution, presented a substantial federal question; and that it was error for the District Court to refuse jurisdiction."

A City is not the State, but is a corporate and artificial entity, that may plead or be impleaded, the same as an individual and the city of Phoenix entered the litigation as such; and if the law under the Constitution can reach and embrace a City, it certainly can reach the individual, and in this instance, grant relief to petitioners herein.

In the past this court has said that all that is necessary to establish jurisdiction in a federal court, is to show that the complaint in good faith asserts the claim of a Federal Question.

City Ry. Co. v. Citizens St. Ry., 166 U. S. 557, 41 L. Ed. 1114.

Cutting v. K. C. Stock Yards Co., 183 U. S. 79, 46 L. Ed. 92-106.

Raymond v. Chi. U. T. Co., 207 U. S. 36, 52 L. Ed. 87.

An attempt to construe the Constitution of the United States, by any court, naturally raises a federal question. Here, the court below attempted to construe the Constitu-

tion, and from which it necessarily follows that it raised a federal question, which this court should be in duty bound to review and pass upon the construction so placed upon the Constitution of the United States, before it allows such to be considered the future rule.

It has been held by this court, that when it becomes necessary to construe or apply the Constitution of the United States in order to reach a correct decision of the material issue, or to decide as to the existence of some right, title, privilege, claim or immunity asserted, or when plaintiff relies upon them in whole or in part for a recovery, or when some right, privilege, immunity or title on which recovery depends will be defeated by one construction, or sustained by a contrary construction of the Constitution of the United States, then and there is presented a Federal Question, and the Supreme Court should hear it.

First Nat. Bank v. Williams, 252 U. S. 504, 64 L. Ed. 690-692.

Sowell v. Fed. Reserve Bank, 268 U. S. 449, 69 L. Ed. 1041.

Levering & G. Co. v. Morrin, 289 U. S. 103, 77 L. Ed. 1062.

Cook v. Avery, 147 U. S. 384, 37 L. Ed. 212.

Shreveport v. Cole, 129 U. S. 41, 41 L. Ed. 591.

L. Y. Gold Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656.

New Orleans v. Benjamin, 153 U. S. 411, 38 L. Ed. 764.

POINT II.

Is it possible that this court is also making an artificial distinction between an action where the individual is deprived of his Constitutional guarantees, by the State, at the instance of an individual as an agent, and an action where the individual is deprived of his Constitutional guarantees, by the State, at the instance of and by the machinations of individuals? There can be no honest difference. The individual citizen is being deprived in both

instances. It is the *deprivation*, which the Constitution is supposed to prevent, and if the machinery of the State is being used, it calls it, "The State." This construction of the lower court is a distinction without a difference. It is pure argument, without truth, reason or logic. The State is acting in both instances, and the machinery of the State is being used in both instances, and with like effect. The results are the same, as in both, the deprivation takes place and the citizen loses his guaranteed rights. What becomes of the guarantee of the Constitution, if such a subtle distinction can be drawn? The use of such a contention and construction (which conflicts with the Constitution itself) is the way to stifle and undermine that wonderful bulwark of individual liberty.

This court, in the following cases, was too intent upon preserving the Constitution of the United States, as written, to allow any fallacious or artificial ideas to enter into their opinions; but it did solemnly declare that Constitutional prohibitions had a real meaning, that the 14th Amendment had reference to every instrumentality of the State, and that the State could not clothe one of its agents with power to annul or evade the same, under any circumstances:

Ex Parte Virginia, 100 U. S. 339-346-347.

Virginia v. Rives, 100 U. S. 313-318-347.

Neal v. Hopkins, 118 U. S. 356.

Scott v. McNeal, 154 U. S. 34.

Gibson v. Mississippi, 162 U. S. 570.

Home Tel. Co. v. Los Angeles, 227 U. S. 278.

The purpose of the Constitution of the United States is to establish justice, it must and can only be effecting justice to the "man in the street," or he whose rights are being taken, when it is free from the application of artificial constructions or interpretations. It makes no difference to him whether his rights are being taken directly or indirectly through the machinery of the State. The crux of

the thing is the man's rights are being taken; it matters not about the machinery which destroys his rights.

The establishment of justice means, and can only mean that it is between man and man; without it, organized government cannot exist. Oppression or enslavement of man by man, is just as intolerable and obnoxious as oppression or enslavement of man by government.

This court did not attempt to split hairs or to make any such fine distinctions in *Marshall v. Holmes*, 141 U. S. 589, nor in *Gaines v. Fuentes*, 92 U. S. 10, nor in *Arrowsmith v. Gleason*, 129 U. S. 86, nor in *Simons v. Southern Ry.*, 236 U. S. 115, nor in any of the cases cited in our previous brief, at page 20, down to and including *Toucy v. N. Y. Life Ins. Co.*, 314 U. S. 118. They are all cases in which this court refused to follow or notice the fallacious and artificial contention or construction now being placed on the Constitution of the United States. But, on the contrary, in the above cases, this court vitalized and followed the rule of Equity to prevent the use of the law to effect injustice and to prevent artificial distinctions from depriving individuals of their guaranteed rights.

Equity.

This is an action in Equity. Not an action at law. Equitable principles should govern. The artificial distinctions between the State acting directly or indirectly by the machinations of individuals, does not apply in Equity. On the contrary, such distinctions ~~countervenes~~ ^{contravenes} and aborts Equity.

Finally.

The crucial question in the case at bar is, not diaphanous distinctions devoid of reality, but is the right to be heard. The right to present the facts. The complaint sets out the facts and fully pleads violations of the Constitution of the United States. If the facts do not support the complaint (here admitted), then the complaint fails, but if the

The demand of the petitioners is for a hearing on the facts. Facts make the law. Law does not make facts. Jurisdiction roots in facts and not elsewhere.

W. H. H. PLATT

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ERNEST D. MARTIN,
Of Counsel.

